Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
and	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98

REPLY OF NETWORK ACCESS SOLUTIONS

by

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SUMMARY

In this Reply, Network Access Solutions ("NAS") responds to arguments made by the ILECs in opposition to the proposals that NAS made in its opening Comments.

First, NAS responds to the arguments made by ILECs in opposition to NAS's proposed definition for "necessary" equipment as the word "necessary" is used in Section 251(c)(6) of the Communications Act. In its initial comments, NAS urged the Commission to define "necessary" equipment as any equipment used by a CLEC either to access UNEs or to interconnect with the ILEC's network even if some of that equipment's functions are used for other purposes.

In this Reply, NAS explains why there is no basis for each of the arguments made by ILECs in opposition to this NAS proposal, as follows:

- NAS shows that there is no validity to the assertion that the D.C. Circuit Court ruled in the Collocation Remand Order that a given piece of equipment is "necessary" for one of the required purposes only if the FCC first defines each function performed by that particular equipment and then affirms that each of those functions is used for one of the required purposes.

- NAS demonstrates that there also is no merit to the claim that the Court's order prohibits the Commission from defining "necessary" in a way that considers the impact of the definition on the ability of CLECs to compete with ILECs.

- NAS likewise documents that there is no basis for the assertion that the FCC's definition of "necessary" will have no negative impact on competition regardless of how the term is defined.

- Equally faulty, as NAS shows, is the contention that events surrounding enactment of Section 251(c)(6) show that Congress intended to mandate that ILECs collocate a given piece of equipment only if the agency affirms that each separate function performed by that equipment is used for a required purpose.

- The claim that the ILECs' proposed definition of "necessary" is in the public interest because it is less regulatory than the definition that NAS has proposed is ridiculous as NAS proves.

- Also untrue, as NAS shows, is the claim that Section 251(c)(6) permits the FCC to require that ILECs permit collocation only of "stand-alone" equipment.

- The claim that the FCC held in the *SBC Project Pronto Order* that ILECs cannot be required to collocate an OCD is false too, as NAS demonstrates.

- Finally, NAS shows that Verizon's claim that requiring collocation of any equipment used for a required purpose is undesirable because it would lead to a huge over-subscription of collocation space is preposterous.

Second, NAS comments on the definition of "necessary" that Qwest has proposed. The Qwest definition is very similar to a definition that NAS recommended in its initial Comments in the event the FCC decides that a more narrow definition than the one summarized above is appropriate. In that case, NAS recommend in its Comments that the Commission define "necessary" equipment as any equipment used for one of the required purposes unless and until the ILEC proves to the Commission that collocation of that equipment is not required as a "practical, economic, and operational" matter.

While Qwest supports a definition of "necessary" that is largely the same as the alternative definition proposed by NAS in its initial Comments, the Commission should clarify three aspects of the Qwest proposal rather than adopt it without clarification, as follows:

- The agency should make clear that a piece of equipment used for interconnection or to access UNEs would be subject to mandatory collocation without regard to whether the equipment's "primary" use is for interconnection or to access UNEs.

- The Commission should clarify for reasons discussed in NAS's initial Comments that the ILEC has the burden of proof to escape a duty to collocate any piece of multi-function equipment used for one of the required purposes.

- The Commission should make clear in any order adopting the Qwest proposal that ILECs must permit CLECs to collocate DSLAMs, routers, and ATM equipment used in providing DSL service.

Finally, NAS makes two points in connection with its proposal in opening Comments that the FCC clarify application of the agency's existing packet switching UNE rule. In its initial Comments, NAS urged the FCC to clarify that Verizon must provide the packet switching UNE under existing FCC rules since Verizon has claimed in other forums that it is not required to

provide that UNE under existing rules merely because it offers CLECs the theoretical ability to collocate their own DSLAMs near all Verizon remote terminals. NAS demonstrated in its initial Comments that Verizon's collocation offer is a sham because the price of remote terminal collocation is so expensive that it would be uneconomic for a CLEC to use collocation to provide DSL service to any end user whose loop is provisioned through a remote terminal.

NAS's first point with regard to this matter is to note that the New York Public Service Commission late last month issued a ruling substantially similar to the one that NAS has proposed. However, since that New York ruling in applicable only in the State of New York, NAS reiterates in its Reply its request for clarification by the FCC.

NAS's second point is to note that Verizon seeks in its own initial Comments to mislead the FCC into believing that there is no need to clarify Verizon's obligation to provide the packet switching UNE merely because Verizon some day may provide that UNE voluntarily. In response, NAS urges the Commission not to be misled, but instead to issue the clarification that NAS has requested, since Verizon has refused for many months to provide the packet switching UNE voluntarily and has argued in other forums that the FCC's packet switching rule imposes no obligation on it to do so.

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REPLY OF NETWORK ACCESS SOLUTIONS

Section 251(c)(6) of Communications Act requires an incumbent local exchange carrier ("ILEC") to let competitive local exchange carriers ("CLECs") collocate any CLEC equipment on ILEC premises that is "necessary" either to access UNEs or to interconnect with the ILEC's network.[1] In comments filed October 12, 2000 in this docket, Network Access Solutions ("NAS") demonstrated that (i) the Commission had correctly defined "necessary" as any equipment used by a CLEC for one of the required purposes even if some of the equipment's functions are used for another purpose, and (ii) the Court's remand order does not require the Commission to modify this definition.[2] However, if the Commission decides to define "necessary" more narrowly, NAS proposed that the agency deem a piece of equipment used for one of the required purposes to be "necessary" *unless* the ILEC proves to the Commission that collocation of that particular equipment is not required as a "practical, economic and operational"

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[1] 47 U.S.C. § 251(c)(6).

[2] NAS Comments at 2-6.

matter in order to provide the service that the CLEC desires to provide.[3] On a separate matter, NAS asked the Commission to clarify that Verizon must provide the packet switching UNE under existing FCC policy in a case where that UNE's functionality is available to Verizon since each pre-condition to the obligation to provide that UNE exists in that case notwithstanding Verizon's claim to the contrary in other forums.

I. There is No Merit to Arguments by SBC, Verizon and BellSouth In Opposition to Defining "Necessary" Equipment as Equipment Used for One of the Required Purposes Even If Some of the Equipment's Functions Are Used for Another Purpose

While numerous commenters agreed with NAS that the Commission should define "necessary" equipment as equipment used for interconnection or to access UNEs regardless of whether each separate feature of the equipment is used for those purposes, Verizon, SBC and BellSouth opposed that definition in their opening Comments. However, the arguments they make in opposition lack merit.

There is no validity to the assertion that the D.C. Circuit Court ruled in the remand order that a given piece of equipment is "necessary" for one of the required purposes only if the FCC first defines each function performed by that particular equipment and then confirms that each of those functions is used for a required purpose.[4] Although the Court speculated in *dicta* that the Commission might want to consider adopting that definition, the Court did not *require* the agency to do so. Instead, the Court recognized that the word "necessary" is inherently ambiguous, and it held *only* that the FCC must provide "a better explanation" for why such

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[3] Id. at 6-8.

[4] Verizon Comments at 6; SBC Comments at 11-12; BellSouth Comments at 5.

multi-function equipment should be deemed "necessary" for the required purposes.[5] In its opening Comments, NAS explained why multi-function equipment should be deemed "necessary."[6]

There also is no merit to the claim that the Court's order *prohibits* the Commission from defining "necessary" in a way that considers the impact of the definition on the ability of CLECs to compete with ILECs.[7] First, as indicated above the Court remanded this matter to the FCC so that the Commission could provide a better explanation of its reasons for defining "necessary" in the way that it had defined the term, not because the Court found that it is unlawful for the Commission to define the term in a manner that considers the impact of the definition on the ability of CLECs to compete with ILECs. To the contrary, the Court's order would have been unlawful if it had held that the FCC is barred from considering the impact of a given definition on competition due to the Court's explicit finding that the word "necessary" is inherently ambiguous.[8] It plainly is appropriate for the Commission to consider the impact of a given definition of "necessary" as used in Section 251(c)(6) on competition since a core objective of Section 251(c) is to facilitate competition.[9]

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[5] See NAS Comments at 2-3.

[6] Id. at 3-6.

[7] SBC Comments at 9-11; Verizon Comments at 4-5, 7 n.4; BellSouth Comments at 2-3.

[8] *GTE v. FCC*, 205 F. 3d 416, 421 (D.C. Cir. 2000).

[9] NAS showed in its opening Comments that defining "necessary" in a way that permits an ILEC to collocate equipment it uses in providing a given service while prohibiting the ILEC's competitors from collocating that same equipment would harm competition by increasing substantially the costs that CLECs must pay for transmission and for the space they use to place their equipment. NAS Comments at 8-10, 12-14. In addition, NAS showed that defining "necessary" in this manner also would harm competition by creating severe operational and practical problems for CLECs. *Id.* at 10-11.

BellSouth makes the absurd claim that the FCC does not need to consider what impact the definition of "necessary" will have on competition because even a definition that prohibited collocation of *all* equipment would have *no* negative impact given that a few large cites have one or two web hosting/data center "hotels" in which CLECs then could place their equipment.[10] In fact, the availability of one or two collocation "hotels" in a given metropolitan area would do *nothing* to prevent hardship to CLECs that provide DSL service since DSL CLECs require collocation space in *dozens* of locations, not just in one or two, in each metropolitan area they serve. This is because DSL service cannot be provided technologically to any end user location that is more than 18,000 feet from the place where the DSLAM serving that end user is located and because FCC policy makes it unlawful for CLECs to provide DSL service by purchasing loop extensions, as NAS explained in its opening Comments.[11]

Equally false is the contention that events surrounding enactment of Section 251(c)(6) show that Congress intended to mandate that ILECs collocate a given piece of equipment *only* if the FCC affirms that each separate function performed by that equipment is used for interconnection or to access UNEs.[12] To the contrary, NAS showed in its opening Comments that the legislative history makes clear that Congress enacted Section 251(c)(6) in order to give the FCC jurisdiction to mandate physical collocation of *any* equipment used for a required

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[10] BellSouth Comments at 4.

[11] NAS Comments at 10-11. See also Central Office Collocation Aff'd attached to NAS Comments.

[12] Verizon Comments at 2-3.

purpose whose collocation the FCC concludes facilitates competition, not to restrict the types of equipment that are subject to mandatory collocation[13]

The assertion that the ILECs' proposed definition of "necessary" is in the public interest because it is less regulatory than the definition that NAS has proposed is ridiculous too.[14] To the contrary, regulators would face a daunting task if the FCC were to adopt the definition that SBC, Verizon and BellSouth propose since that definition would require regulators first to separate each piece of equipment into its various component functions and then to determine whether each of those functions is used for a required purpose. The first difficult task would be developing criteria for deciding which features of a given piece of equipment are sufficiently discrete to justify disaggregating them. Equally daunting would be the need to define the circumstances under which a given discrete function would be deemed to be one that is used for interconnection or to access UNEs rather than for some other purpose. Not surprisingly, none of the three ILECs even *attempts* to describe the criteria it wants the FCC to use in either of these two situations, probably because each of them recognizes that development of rational criteria would be extraordinarily difficult and probably impossible. Moreover, the fact that the ILECs themselves apparently reach a different conclusion about whether specific types of equipment meet whatever criteria they have in mind evidences the extraordinary complexity that would be inherent in the development of a rule to implement the policy they propose. For example, while Verizon suggests that DSLAMs, OCDs, and multiplexers might be subject to mandatory collocation under this rule since each of their functions *is* used for a required purpose, SBC

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[13] NAS Comments 3-4.

[14] Verizon Comments at 6-7.

claims that this same equipment might *not* be subject to mandatory collocation on grounds that some features in this equipment are *not* used for the required purposes but instead are used either to change the way loops are used or for a purpose that is "ancillary" to interconnection or to access UNEs.[15]

Also untrue is the claim that Section 251(c)(6) permits the FCC to require that ILECs permit collocation only of "stand-alone" equipment since only "telecommunications equipment" is subject to mandatory collocation under Section 251(c)(6), and only a "stand-alone" device is "telecommunications equipment."[16] In fact, Section 1(45) of the Act defines "telecommunications equipment" as including *any* device used in providing telecommunications service, and the FCC has ruled that this definition includes circuit boards, software, and any other type of stand-alone or non-stand-alone device.[17]

The claim that the FCC held in the SBC *Project Pronto Order* that ILECs cannot be required to collocate an OCD on grounds that an OCD is not used in accessing UNEs also is wrong.[18] In that order, the FCC made no decision about whether an OCD is used in accessing UNEs. Instead, it held only that the earlier SBC/Ameritech merger order would require that SBC permit CLECs to collocate OCDs *even if* an OCD were *not* used to access UNEs since SBC places its own ODCs on its premises and since that earlier order requires SBC to permit CLECs

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[15] Compare Verizon Comments at 7 with SBC Comments at 15-16.

[16] Verizon Comments at 8; SBC Comments at 16.

[17] *See, e.g., Implem. of §§ 255 and 251(a)(2)*, 17 Comm. Rec. 2d (P&F) 2d 837 at ¶ 82 (1999) ("all software integral to telecommunications equipment is covered by the definition [of telecommunications equipment in Section 1(45) of the Act] whether such software is sold with a place of telecommunications equipment hardware or is sold separately").

[18] SBC Comments at 15.

to collocate any equipment of a type that SBC collocates for its own purposes without regard to whether that equipment is used to access UNEs.[19]

Finally, Verizon makes the absurd claim that requiring collocation of any equipment that is used for a required purpose is undesirable because it would lead to a huge over-subscription of collocation space that "stays empty for years" while CLECs await development of new and large multi-function equipment for collocation.[20] First, both FCC policy and Verizon's own interconnection agreements flatly prohibit CLECs from warehousing collocation space. Second, there is no correlation between the type of equipment that is subject to mandatory collocation and the extent to which CLECs may attempt unlawfully to hoard collocation space. In fact, requiring ILECs to let CLECs collocate multi-function equipment actually could *reduce* the amount of collocation space that CLECs need because multi-function equipment tends to be newer equipment, and newer equipment typically is smaller than earlier models.[21]

II. With Three Clarifications, the Manner In Which Qwest Proposes to Define "Necessary" Would Be Acceptable If the Commission Decides Not To Mandate Collocation of All Mutlti-Function Equipment Used for Interconnection Or to Access UNEs

While there is no validity, as shown above, to any of the ILECs' arguments against defining "necessary" equipment as equipment used for one of the required purposes even if some of the equipment's functions are used for another purpose, the Commission theoretically could

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[19] *SBC Project Pronto Order* at ¶ 36, FCC 00-336, rel. Sept. 8, 2000.

[20] Verizon Comments at 7-8.

[21] While an ILEC should be permitted to reclaim a CLEC's dormant collocation space after an unreasonable period of dormancy, the Commission should make clear that the nondiscrimination prohibition in Section 251(c)(6) of the Act also requires an ILEC to permit a CLEC to claim space for its use if the ILEC has not committed to use that space in the same amount of time in which a CLEC must use its collocation space in order to avoid forfeiture of that space. *See* NAS Comments at 21-23.

choose to define the term more narrowly. If it does so, however, it should hold, as NAS explained in its opening Comments, that a given piece of equipment used for one of the required purposes is "necessary" for that purpose unless and until an ILEC proves to the Commission that collocation of that equipment is not required as a "practical, economic and operational" matter in order to provide the service that the CLEC desires to provide.[22]

While Qwest supports a definition of "necessary" that is substantially identical to NAS's alternative definition, the Commission should not adopt the Qwest definition without clarifying three matters. First, the agency should make clear that a piece of equipment used for interconnection or to access UNEs would be subject to mandatory collocation without regard to whether the equipment's "primary" use is interconnection or access to UNEs. Qwest appears to recognize that conditioning the collocation rights of a given piece of multi-function equipment on a finding that the "primary" purpose of that equipment is interconnection or accessing UNEs would impose a significant regulatory obligation on the agency, and it offers no suggestion about how the FCC could distinguish a "primary" function from any other function.[23] Nonetheless, Qwest suggests that it might be appropriate, in order to discourage manufacturers from including totally extraneous features in equipment used for the required purposes, for the FCC to declare a given piece of equipment as subject to mandatory collocation *only* if the equipment's "primary" function is to permit interconnection or access to UNEs.[24] However, since manufacturers have absolutely no incentive to include extraneous features in equipment that is collocated on ILEC

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[22] NAS Comments at 6-8.

[23] Qwest Comments at 4 ("Primary . . . is a word which may have multiple meanings").

[24] *Id.* at 5.

premises, as NAS has shown,[25] no purpose would be served by giving mandatory collocation rights only to multi-function equipment whose "primary" purpose is to facilitate interconnection or access to UNEs.

Second, the Commission should clarify that the ILEC has the burden of proof to escape a duty to collocate a piece of multi-function equipment used for one of the required purposes. Although Qwest implies that it would support placing the burden of proof on the ILEC, [26] it does not say so explicitly. It is crucial that the Commission place the burden of proof on the ILEC if it adopts the Qwest proposal for reasons discussed in NAS's opening Comments.[27]

Finally, the Commission should make clear in any order adopting the Qwest proposal that ILECs must permit CLECs to collocate DSLAMs, routers, and ATM equipment used in providing DSL service even if new features are added in the future. NAS already has explained why each of these devices would be subject to mandatory collocation under the standard proposed by Qwest.[28] NAS also has explained why it is important that the agency make this clarification in the final order in this proceeding rather than in some later proceeding.[29] Significantly, Qwest agrees that each of the devices would be subject to mandatory collocation under the standard it recommends.[30]

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[25] NAS Comments at 4-6.

[26] Qwest Comments at 6.

[27] NAS Comments at 7-8.

[28] *Id.* at 6-14.

[29] *Id.* at 8.

[30] Qwest Comments at 4.

III. Verizon's Sole Argument Against Making Clear that It Must Provide the Packet Switching UNE – That There Is No Need to Make This Obligation Clear Since Verizon May Provide the UNE Voluntarily – Is Absurd Given that Company's Arguments Elsewhere that It Is Not Required To Provide This UNE

Recognizing that a CLEC cannot economically provide DSL service to an end user loop that is provisioned through an IDLC system unless the ILEC who owns the loop and IDLC equipment gives the CLEC access to the IDLC and packet switching functionality, Commission Rule 51.319(c)(3)(B) mandates that the ILEC provide CLECs with what the FCC calls the "packet switching UNE." Despite its name, the FCC has made clear that the packet switching UNE includes not only packet switching but also the functionality provided by the IDLC.[31] By its terms, this FCC Rule requires an ILEC to make available the packet switching UNE if the ILEC itself uses this functionality and "has not permitted . . . [CLECs] to deploy DSLAMs at the remote terminal" in which the ILEC's IDLC equipment is located.

In its opening Comments, NAS urged the Commission to clarify that Verizon must provide the packet switching UNE under this existing Commission Rule since Verizon has claimed in other forums that it is not required to provide this UNE merely because it offers CLECs the theoretical ability to collocate their own DSLAMs near all Verizon remote terminals.

NAS demonstrated in its opening Comments that Verizon's collocation offer is a sham since the price of remote terminal collocation is so expensive that it would be uneconomic for a CLEC to use collocation to provide DSL service to any end user whose loops are provisioned through an IDLC system.[32]

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[31] *See UNE Remand Order*, 15 FCC Rcd. 3696 at ¶¶ 303-04 (1999).

[32] NAS Comments at 15-19. In its own opening Comments, AT&T offers additional evidence that collocating DSLAM functionality at Verizon's remote terminals is uneconomic. AT&T

(continued)

Events occurring since opening Comments were filed support the clarification that NAS has proposed. On October 31, 2000, the New York Public Service Commission ("NYPSC") issued an order similar to the one that NAS has asked the FCC to adopt. In its order, which applies only in New York, the NYPSC held that it is not economic for a CLEC to provide DSL service over loops provisioned from remote terminals by collocating equipment performing DSLAM functionality (including line cards) in or near the remote terminals that contain Verizon's IDLC equipment.[33] Because of this fact, the agency held that Verizon must provide the packet switching UNE to CLECs no later than the date that a Verizon affiliate begins offering DSL service over loops provisioned through that remote terminal.[34]

Since remote terminal collocation is as uneconomic in all states where Verizon is the ILEC as it is in New York,[35] the FCC should make clear that Verizon must provide the packet switching UNE in all states by no later than the date that either Verizon or a Verizon affiliate begins offering DSL service over loops provisioned through remote terminals in that state. Moreover, the Commission should make clear that neither Verizon nor an affiliate may begin offering DSL service over loops provisioned through remote terminals in a given state until *after* the PUC in that state has issued a final order which holds that the price of Verizon's packet

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Comments at 52-55. *See also* Alcatel Comments at 16, 19-20.

[33] *Opinion and Order Concerning Verizon's Wholesale Provision of DSL Capabilities* at 25, Case 00-C-0127, Oct. 31, 2000 ("The record shows that . . . collocation by competitors on the terms offered by Verizon's tariff at these remote terminals is under many circumstances prohibitively costly and slow and unlikely to be commercially viable").

[34] *Id.* at 26 ("Verizon does not currently meet the FCC preconditions for us to require a general offering of [the] packet switching [UNE] as a network element, because Verizon is not currently providing this element to its data affiliate. If it were to do so, Verizon would have to offer this element to all competitors.").

[35] NAS Comments at 17-19. *See also* Collocation Aff'd attached to the NAS Comments.

switching UNE complies with the FCC's TELRIC pricing methodology. In the absence of this latter clarification, experience proves that Verizon would give itself a lengthy head start in providing DSL service over loops provisioned from remote terminals by filing patently uneconomic prices for the packet switching UNE one or two days before it or its affiliate begins providing DSL service over loops provisioned through remote terminals, thereby preventing CLECs from using the UNE as a practical matter until *after* the PUC conducts the proceeding necessary to prescribe a price that is consistent with the FCC's TELRIC policy. Based on experience, this proceeding would take a minimum of six months.

In its opening Comments, Verizon seeks to mislead the FCC into believing that there is no need for an order clarifying that it must provide the packet switching UNE. Verizon does this by arguing that clarification is not necessary since someday Verizon may provide the UNE voluntarily.[36] The Commission should not be misled, but instead should issue the clarification that NAS has requested since Verizon has refused to provide the packet switching UNE voluntarily during the one year period since the packet switching UNE rule has been in effect and since Verizon has argued in *other* forums, as NAS documented in opening Comments, that it is under *no* obligation to provide that UNE.[37]

CONCLUSION

For the reasons set forth in our opening Comments and in this Reply, the Commission should (1) adopt a definition of "necessary" for purposes of Section 251(c)(6) of the Act which makes clear that ILECs must permit CLECs to collocate the DSLAMS, routers and ATM equipment used in providing DSL-based service, (2) make clear that Verizon (and all similarly

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[36] Verizon Comments at 11-12.

situated ILECs) must provide the packet switching UNE when the functionality of that UNE is available to Verizon (or the comparably situated ILEC), and (3) clarify that an ILEC must give CLECs either one year to use their collocation space or whatever longer period the ILEC gives itself to reserve space for its own use.

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[37] NAS Comments at 19-20.

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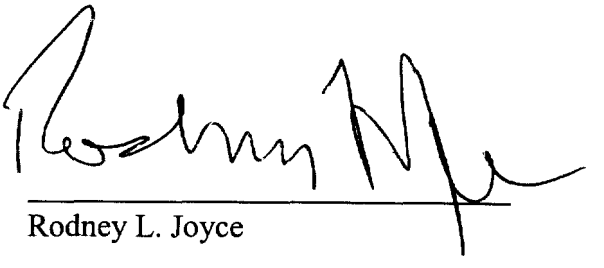

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